CIVIL APPEAL.

M. S. Mahendran for the appellant.

Thomson J. : — This is an appeal from the Magistrate's Court at Taiping.

The appellant, who is a licensed moneylender, sued the respondent who is a female South Indian rubber tapper and who, on a finding of the Magistrate, does not understand the English language, on an alleged Promissory Note for $150. The Magistrate decided the case against the appellant and gave judgment for the defendant with costs. Against that decision the plaintiff has now appealed.

At the hearing of the appeal I took the view that it was entirely without merit but as the case raises a question of some considerable importance and, so far as I am aware, of novelty I reserved judgment.

The appellant's story was that on 7th March, 1955, he lent a sum of $150 to the respondent. A Promissory Note was drawn up in the English language bearing a form of certificate as required by section 27 of the Moneylenders Ordinance. The parties then proceeded to the house of Dr. Mohd. Ghows, a Justice of the Peace. Dr. Ghows explained the contents of the Promissory Note to the respondent and the sum of $150 was paid to her in his presence. The Note was executed by the parties and the statutory certificate was signed by Dr. Ghows. The Note, I should add, which was produced by the appellant, was in a printed form which has been commonly in use since the commencement of the present Moneylenders Ordinance and which, so far as I am able to advise myself, is unobjectionable. Dr. Ghows was not called as a witness.

The story of the defendant and her witnesses was that she had been in the employment of the appellant for some time, that she was indebted to him in the sum of $50, that after some discussion as to the amount of this indebtedness she affixed her thumb-print to a printed form similar to the Promissory Note sued on but in which the blanks had not been filled in, that she received no money, that she did not know Dr. Ghows and that she never went to his house at any time.

For reasons which he sets out at length in his admirable judgment and which impress me as both cogent and convincing the learned Magistrate accepted the story of the defendant and her witnesses and rejected that of the plaintiff. He went on, however, to say that in any event the Promissory Note sued on was a document which was required by law to be attested, that the attesting witness was not called to give evidence and that, therefore, by reason of section 68 of the Evidence Ordinance it could not be "used as evidence."

On reflection, I am satisfied that on this point the learned Magistrate is correct. Section 68 of the Evidence Ordinance provides that, subject to an exception which does not arise in the present case, if a document "is required by law to be attested" it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. Section 27 of the Moneylenders Ordinance, 1951, provides that if a promissory note is taken as security for any loan and the borrower is a person not understanding the written language on such note "the note shall be attested" by one of a list of functionaries which includes Justices of the Peace. The note in question in the present case is clearly one which is required to be attested by section 27 of the Moneylenders Ordinance and that being so it was a document which could not be used as evidence until section 68 of the Evidence Ordinance was complied with. It is true, and counsel for the appellant tried to make something of this, that by reason of section 70 of the Evidence Ordinance compliance with section 68 is not necessary where a party to a document required by law to be attested admits its execution by himself. That, however, has no application to the present case for the respondent did not admit the execution of the Promissory Note. What she admitted was putting her thumb-print on a printed form containing blanks which had not been filled in.

The appeal is dismissed with costs.

Appeal dismissed.

ABDULLAH BIN AWANG BONGKOK v. PUBLIC PROSECUTOR

[C.A. (Mathew C.J., Whyatt C.J.(S) and Good J.) January 24, 1956]

[K.L. — F.M. Criminal Appeal No. 80 of 1955]

Evidence Ordinance, 1950, s. 24 — Confession recorded by Magistrate — Whether confession was made freely and voluntarily.

The appellant in this case was convicted of murder and sentenced to death. The only point which was argued was whether the confession made by the appellant to a Magistrate should have been admitted in evidence. While recording the memorandum of enquiry, the Magistrate asked a question and got an answer as follows: "Q: — Did anyone make you a promise that if you make a statement to a Magistrate that he would let you off easily? A: — One Malay police constable whose

name I do not know told me that if I made a statement I might be let off. Q:—Anybody else make that promise? A:—No one else. Q:—Now, are you making a statement to me because of that promise only or are you making it out of your free will? Before we go any further I must warn you that I am a Magistrate and that you are not bound to make any statement to me if you do not wish to do so; but if you made a statement, such statement may be used as evidence against you in any Court of Law. Do you understand that? A:—I understand. Q:—Do you still wish to make a statement? A:—Yes. Q:—While in custody were you ever threatened with assault? A:—No. Q:—Did Inspector Martin or the Sergeant who brought you here or anyone else threaten you or illtreat you or promise you any hope to induce you to make a statement? A:—No. Q:—Do you still wish to make a statement? A:—Yes." The Magistrate, being satisfied that the appellant wished to make a voluntary statement, recorded his statement. At the trial, counsel for the defence objected to the admission of the statement and, after hearing arguments and evidence (in the absence of the assessors), the learned trial Judge ruled that the statement was admissible under s. 24 of the Evidence Ordinance.

Counsel for the appellant submitted that the promise held out by the unknown Malay constable rendered the statement inadmissible and that the further questions put to the appellant by the Magistrate did not have the effect of making the statement a voluntary one.

Held: (1) the answers to the further questions put to the appellant by the Magistrate made it plain beyond any doubt that the statement was made freely and voluntarily and was properly admitted in evidence under s.24 of the Evidence Ordinance; (2) the effect of the promise alleged to be made by the unknown Malay constable was removed by the very careful questions put to the appellant by the Magistrate and it would appear from the answers to the questions that no promise was in fact ever made.

Case referred to:—

(1) *Selvadurai v. Public Prosecutor* (1949) M.L.J. 68; (1948-49) M.L.J. Supp. 43.

CRIMINAL APPEAL to the Court of Appeal.

R. P. S. Rajasooria for the appellant.

J. G. Adams (Federal Counsel) for the respondent.

Mathew C.J. (delivering the judgment of the Court):—The only point which has been argued on behalf of the appellant (who was convicted of murder and sentenced to death) was whether the confession he made to a Magistrate should have been admitted in evidence. While recording the memorandum of enquiry, the Magistrate asked a question and got an answer as follows:—

"Q:—Did anyone make you a promise that if you make a statement to a magistrate that he would let you off easily?

A:—One Malay police constable whose name I do not know told me that if I made a statement I might be let off."

The Magistrate then asked a series of questions (and received answers) which it is convenient to set out:—

"Q:—Anybody else make that promise?

A:—No one else.

Q:—Now, are you making a statement to me because of that promise only or are you making it out of your free will?

Before we go any further I must warn you that I am a magistrate and that you are not bound to make any statement to me if you do not wish to do so; but if you made a statement, such statement may be used as evidence against you in any Court of law. Do you understand that?

A:—I understand.

Q:—Do you still wish to make a statement?

A:—Yes.

Q:—While in custody were you ever threatened with assault?

A:—No.

Q:—Did Inspector Martin or the Sergeant who brought you here or anyone else threaten you or illtreat you or promise you any hope to induce you to make a statement?

A:—No.

Q:—Do you still wish to make a statement?

A:—Yes."

The Magistrate, being satisfied that the appellant wished to make a voluntary statement, recorded his statement. At the trial, Counsel for the defence objected to the admission of the statement and, after hearing arguments and evidence (in the absence of the assessors), the learned trial Judge ruled that the statement was admissible under section 24 of the Evidence Ordinance.

Mr. Rajasooria for the appellant has submitted that the promise held out by the unknown Malay constable rendered the statement inadmissible, and that the further questions put to the appellant by the Magistrate did not have the effect of making the statement a voluntary one. In our view, the answers to the further questions put to the appellant by the Magistrate made it plain beyond any doubt that the statement was made freely and voluntarily and was properly admitted in evidence under section 24 of the Evidence Ordinance.

Mr. Rajasooria further submitted on the authority of *Selvadurai v. Public Prosecutor*[1] that the promise made by the unknown Malay constable, though a slight inducement, was sufficient to render the statement inadmissible, particularly as there was no other evidence to connect the appellant with the killing. As we have already indicated, the effect of this promise was

removed by the very careful questions put to the appellant by the Magistrate, and it would appear from the answers to those questions that no promise was in fact ever made.

Consideration of the two statements, together with the medical evidence, could have left no doubt in the learned trial Judge's mind as to the truth of the two statements. In our view, the evidence supports the conviction, and the appeal is accordingly dismissed.

Appeal dismissed.

ABDULLAH BIN SAAD v. PUBLIC PROSECUTOR

[C.A. (Mathew C.J., Buhagiar and Good JJ.) January, 24, 1955]

[K.L.—F.M. Criminal Appeal No. 83 of 1956]

Penal Code. s. 302 — Murder — Only evidence against appellant was that he pawned some jewellery which belonged to the deceased — Evidence insufficient to found a conviction for murder — Evidence Ordinance, 1950, s. 114 illustration (a) — Circumstantial evidence.

The appellant in this case was convicted of murder. The deceased met his death on May 15, 1955. It was proved that on May 16, 1955 appellant pawned some jewellery which belonged to the deceased. Apart from this piece of evidence, there was nothing to connect the appellant with the crime.

Held: the only evidence to connect the appellant with the killing was the pawning of two pieces of jewellery, the property of the deceased, and it was not certain that they were on the deceased's person on the day of his death; this did not supply sufficient evidence on which to found a conviction for murder and therefore the conviction must be set aside.

CRIMINAL APPEAL to the Court of Appeal.

A. Jayadeva for the appellant.

J. G. Adams (Federal Counsel) for the respondent.

Mathew C.J. (delivering the judgment of the Court): — The appellant was convicted of the murder of an old fowl-seller and was sentenced to death. The deceased met his death on 15th May, and on the 17th of May his body was discovered in an abandoned tapioca plantation. His hands and feet were tied and two sticks were lying near the body. Either of those sticks could have caused the injuries which resulted in his death.

It was proved that on the 16th of May the appellant pawned some jewellery which belonged to the deceased. Apart from this piece of evidence there is nothing to connect the appellant with the crime. One Saad gave evidence that he was called by the appellant to the scene of the killing and asked to assist in digging a grave; but in his summing up to the assessors the learned trial Judge directed them to disregard his evidence entirely and, presumably, when the learned trial Judge convicted the appellant he himself disregarded Saad's evidence. The conviction then rests entirely on the proved fact that the appellant was in very recent possession of property of the deceased. Whether the deceased was carrying exhibits P9 and P10 on the day he met with his death is not certain. All that is known definitely is that exhibits P9 and P10 were handed to the deceased by his brother (P.W. 4) on the 2nd of May 1955 and that it was his habit to carry his valuables and money in a cloth belt round his waist.

In his summing up to the assessors, the learned trial Judge said :—

"Mr. Sheldon referred you to certain statutory presumptions and what he told you is correct law, but they should not be applied unless you are satisfied that no reasonable explanation of the recent possession of the jewellery by accused has been given."

Presumably, the statutory presumption was illustration (a) of section 114 of the Evidence Ordinance, which reads :—

"The Court may presume —

(a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;"

Wills on Circumstantial Evidence, 7th edition, p. 104 has the following passage :—

"The possession of stolen goods recently after the loss of them, may be indicative not merely of the offence of larceny, or of receiving with guilty knowledge, but of any other more aggravated crime which has been connected with theft. Upon an indictment for arson, proof that property which was in the house at the time it was burnt, was soon afterwards found in the possession of the prisoner, was held to raise a presumption that he was present at, and concerned in, the offence; **R. v Rockman** (1789) 2 East P.C. p.1035, and see **R. v Fuller**, (1816) R. & R. 308. This particular fact of presumption commonly forms also a material element of evidence in cases of murder; which special application of it has often been emphatically recognised. It is upon the same principle that a sudden and otherwise inexplicable transition from a state of indigence and a consequent change of habits or a profuse or unwanted expenditure inconsistent with the position in life of the party, is sometimes a circumstance extremely unfavourable to the supposition of innocence (**R. v Burdock**) (murder by poison) Bristol Assn. Ap.1835, Cor: Sir Charles Wetherell, Recorder.